No. 17-1625

IN THE
Supreme Court of the United States

RIMINI STREET, INC., AND SETH RAVIN,

Petitioners,

v.

ORACLE USA, INC., ORACLE AMERICA, INC., AND ORACLE INTERNATIONAL CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

BLAINE H. EVANSON
JOSEPH A. GORMAN
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071
(213) 229-7000

MARK A. PERRY
Counsel of Record
JEREMY M. CHRISTIANSEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
MPerry@gibsondunn.com

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate disclosure statement contained in the Brief for Petitioners remains accurate.

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REPLY BRIEF FOR PETITIONERS

The arguments of respondents and their *amici* support reversal, not affirmance:

Text: They focus on the adjective "full," while ignoring the meaning of the noun "costs," in 17 U.S.C. § 505. As this Court recently explained, "[a]djectives modify nouns." *Weyerhaeuser Co.* v. *U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018). Section 505 itself establishes that the noun "costs" does not include nontaxable expenditures.

Precedent: They assume that "costs" means any "expenses borne in the course of litigating." Resp.Br.17. But this Court has repeatedly rejected this assumption, holding that "'costs' is a term of art" limited to the taxable costs "set out in 28 U.S.C. § 1920." *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 297-98 (2006).

History: They argue that, at some unspecified point in the past, the term "full costs" permitted shifting all litigation expenses. But they do not cite a single decision in which any court awarded open-ended expenditures (such as expert fees) in a copyright case before the Ninth Circuit's rogue decision in *Twentieth Century Fox Film Corp.* v. *Entertainment Distributing*, 429 F.3d 869 (9th Cir. 2005).

Policy: They think compensating rights-holders serves the purposes of the copyright laws, but the pertinent consideration is uniformity among federal cost- and fee-shifting statutes—which is served by consistently construing "costs" as the taxable costs enumerated in Section 1920 unless Congress explicitly provides otherwise.

I. STATUTORY TEXT AND STRUCTURE.

After petitioners' principal brief was filed, this Court issued a unanimous decision that all but resolves this case. In *Weyerhaeuser*, this Court considered a governmental designation of certain land as "critical habitat" of the dusky gopher frog under the Endangered Species Act. 139 S. Ct. at 364. The decision turned on the grammatical structure of the statutory terms:

> Our analysis starts with the phrase "critical habitat." According to the ordinary understanding of how adjectives work, "critical habitat" must also be "habitat." *Adjectives modify nouns*—they pick out a subset of a category that possesses a certain quality. It follows that "critical habitat" is the subset of "habitat" that is "critical" to the conservation of an endangered species.

Id. at 368 (emphasis added).

Petitioners here made precisely the same point about the interrelationship between the adjective ("full") and noun ("costs") in 17 U.S.C. § 505. Pet.Br.20-22, 34; *see also* U.S.Br.5, 13; Corpus Br. 21. The adjective "full" modifies the noun "costs," just as the adjective "critical" modified the noun "habitat" in *Weyerhaeuser*. Yet respondents and their *amici* do not even cite *Weyerhaeuser*, let alone try to explain why it is not dispositive of the textual question here. Indeed, the word "noun" does not even appear in respondents' brief. *But see* Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 140 (2012) ("Words are to be given the meaning that proper grammar and usage would assign them").

1. Respondents and their *amici* focus on the adjective "full," emphasizing repeatedly that "'full' means full." Resp.Br.1; *see also* Linguistics Scholars Br. 13-16; Baicker-McKee Br. 2; BSA Br. 11; Copyright Alliance Br. 9-11. Based on the word "full," respondents' lead argument is that "[t]he statute means what it says: A prevailing party may receive his full costs, not just a subset of them." Resp.Br.1.

By focusing on the wrong word in the statutory phrase, respondents and their amici completely beg the question presented—*i.e.*, whether "costs" in 17 U.S.C. § 505 is limited to taxable costs or also includes non-taxable expenditures. *See* Pet.Br.i. The *noun* (costs) controls what expenditures may be recovered; the *adjective* (full) specifies how much. Thus, while "all" is undoubtedly a synonym for "full" (*see Burton's Legal Thesaurus* 28 (5th ed. 2013)), either adjectival term only qualifies the noun *costs*.

One of respondents' *amici* offers the example of the "full moon." Linguistics Scholars Br. 15. There is no doubt that a full moon can wax no further; but it is equally indisputable that the fullness of the moon says nothing about the phase (or even visibility) of any other celestial body. "Full" in *amici*'s example modifies "moon," and not "Mars" or "Venus"—just as "full" in Section 505 modifies "costs," and not "fees" or "expenses." *See* Pet.Br.34.

2. Respondents and their *amici* all but ignore the meaning of "costs." Respondents devote a bare half-paragraph to this critical definition:

> The ordinary meaning of the term "cost" is the "amount spent for something." That "everyday meaning" is "synonymous with expenses,"

> *i.e.*, the "expenses borne" in the course of litigating. The ordinary meaning of the term "full costs," therefore, is all expenses borne.

Resp.Br.17 (citations omitted). And respondents' *amici* simply assume that "costs" in Section 505 carries this "everyday" meaning, without bothering to analyze the question. *See* Baicker-McKee Br. 7; BSA Br. 13; Copyright Alliance Br. 24-25; Linguistics Scholars Br. 18; NMPA Br. 16; Oman Br. 3-14.

As explained further below, this Court has *never* given the word "costs" an expansive "everyday meaning" in the context of federal cost- and fee-shifting statutes—including in the decision that respondents misleadingly misquote. *Compare* Resp.Br.17 *with Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012). Rather, the Court has consistently *rejected* the very definition that respondents now advance, holding instead that the term "costs" in federal statutes refers more narrowly to the categories of taxable litigation expenses defined by Congress in Sections 1920 and 1821. 566 U.S. at 573; *see* Pet.Br.22-23.

Because the Court is not deciding this case on a *tabula rasa*, it is of no moment whether the term "costs" *could*, in the abstract, be construed as broadly as all "expenses borne" in the course of litigating. Resp.Br.17. The question presented in this case is whether the term "costs" in 17 U.S.C. § 505 *does* have that meaning. Respondents do not even acknowledge the relevant question, let alone advance a satisfactory answer to it. Their half-hearted effort is refuted by Section 505 itself.

3. If "full costs" meant all "expenses borne" in litigation, it would necessarily include attorneys' fees.

But the text and structure of Section 505, which separately permits courts to *also* award attorneys' fees, forecloses such an interpretation:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. *Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.*

17 U.S.C. § 505 (emphasis added). Respondents contend that the first sentence gives complete discretion to a district court to award any and all litigation expenditures, including attorneys' fees, in any amount. Resp.Br.22-23. This necessarily means that the entire second sentence of Section 505, italicized above, serves no purpose. *See* Pet.Br.35; U.S.Br.13-14. This surplusage is alone sufficient to condemn respondents' construction.

Respondents attempt to explain away this superfluity by saying that Congress was merely "removing doubt" about the availability of attorneys' fees as part of "full costs." Resp.Br.30-31. But here again, respondents ignore both the text and the rules of the English language.

Section 505 says that courts may "*also*" award attorneys' fees as part of the costs. 17 U.S.C. § 505 (emphasis added). As this Court recently explained, "'also' is a term of enhancement; it means 'in addition; besides'" and "is *additive rather than clarifying*" in nearly all of its usages "throughout the U.S. Code." *Mount Lemmon Fire Dist.* v. *Guido*, 139 S. Ct. 22, 25-26 (2018) (emphasis added). When Congress amended

the Copyright Act in 1909 and 1976, it *added* the authority to award attorneys' fees—it was not just clarifying an authority that already existed.

Respondents' position is also flatly inconsistent with dozens of other federal statutes. Their insistence that "full costs" means all "expenses borne" in litigation would necessarily apply to statutes authorizing "all costs" as well (since, by their own lights, "all" and "full" are synonymous in this context). Many statutes provide for "all costs *and expenses*." *E.g.*, 6 U.S.C. § 1142(c)(3)(C) (emphasis added). These statutes become incomprehensible under respondents' interpretation (*i.e.*, "all expenses borne in litigation and expenses"). Moreover, Congress in some statutes provided for "all costs and expenses (including attorneys' and expert witness fees)" (*e.g.*, 15 U.S.C. § 2087(b)(3)(B)), yet in others, provided only for "all costs and expenses (including attorney's fees)" but excluded expert fees (*e.g.*, 30 U.S.C. § 815). All of these words would be superfluous (and contradictory) if costs were interpreted to mean all expenses borne, as respondents suggest.

In sharp contrast, construing "costs" in Section 505 as "taxable costs" does not imperil the operation of any other cost- or fee-shifting provision—including the four other statutes that use the term "full costs." *See* Resp.Br.19. (The ambiguous statement of a single legislator regarding one such statute, *see id.* at 7, is manifestly insufficient in this context to override the text. *See Murphy*, 548 U.S. at 304 (rejecting much clearer legislative history).) In cases governed by such provisions, a prevailing party may be awarded *all* of its taxable costs, but non-taxable expenditures require separate congressional authorization.

4. Respondents offer several purportedly "textualist" objections to the conclusion that "costs" in Section 505 means "taxable costs." None withstands scrutiny.

First, respondents say that petitioners' and the United States' position "effectively reads the word 'full' out of the statute." Resp.Br.18. It does not. By respondents' own admission, "full" is an adjective of *quantity*. *Id.* at 17. Thus, it provides that the district court may award the full *amount* of costs listed in Section 1920—*i.e.*, *all* taxable costs, rather than only *some* of them. While reasonable persons can disagree whether the district court *must* award all taxable costs (Pet.Br.35) or retains discretion to disallow certain costs (U.S.Br.28), neither position is "convoluted" or "confusing," much less "silly." *See* Resp.Br.22. Rather, *both* give meaning to the adjective "full" in Section 505. (And even if "full costs" contains an inherent redundancy, which it does not, reading one word as superfluous does less violence to the congressional design than construing Section 505 in a way that makes its entire second sentence surplusage, as respondents' approach requires.)

Second, respondents argue that if "full costs" in Section 505 were limited to the costs enumerated in Section 1920, then "the entire grant of discretion in §505 to 'allow the recovery of full costs,' ... would be meaningless" because "Section 1920 already gives district courts discretion to award a prevailing party the costs the statute enumerates, at the rates §1821 sets forth." Resp.Br.19. But myriad federal statutes grant district courts the authority to award "costs." *E.g.*, 12 U.S.C. § 2607(d)(5); 15 U.S.C. §§ 2618(d), 2619(c)(2), 6104(d), 7805(b)(3); 28 U.S.C. §§ 1447(c); 29 U.S.C. §§ 431(c), 1132(g)(1), 3612(p); 47 U.S.C. §§ 402(i),

551(f)(2). These statutes all overlap with Section 1920 (and Rule 54(d)); as this Court has observed, such "redundancy is 'hardly unusual' in statutes addressing costs." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013).

Third, respondents insist that the view of petitioners and the United States would render the term "taxable costs" "redundant" and the "term 'nontaxable costs'" an "oxymoron." Resp.Br.26.

As to "taxable costs," there are various ways of describing the same thing—"costs of suit," "costs of the action," "full costs," and "costs" *simpliciter*. Corpus Br. 36 & n.47. To petitioners' knowledge, no public law used the phrase "taxable costs" before the Fee Act; that phrase was used in a handful of later statutes (*see* 31 Stat. 1312, ch. 854, § 753 (1901)), but never gained currency. In the Copyright Act, "full costs" was used in the 1831 Act, while some 1856 amendments used "costs of suit" (*see* U.S.Br.26 n.5), and one 1909 provision used "taxable costs" (Resp.Br.28)—all to denote taxable costs. It is hardly surprising that over long stretches of time, different (although similar) terms and phrases have been used to describe the same concept. The term of art *costs* is the unifier among these articulations.

The phrase "non-taxable costs," in contrast, most definitely *is* oxymoronic, and the Court should take this opportunity to abolish it from the lexicon. This Court has used it only once (*see Taniguchi*, 566 U.S. at 575), and it does not appear anywhere in the United States Code. To be sure, the phrase appears in Federal Rule of Civil Procedure 23(g) and (h), as amended in 2003; but "nontaxable costs" may be awarded in a class action only as "authorized by law"—which, in the

context of this case, is the question presented. Importantly, the Rule that actually governs costs uses the more accurate phrase "nontaxable expenses" to distinguish such expenditures from taxable costs. Fed. R. Civ. P. 54(d)(2)(A).

* * *

Section 505 authorizes a district court to award the prevailing party in a copyright case *all* of its "costs." That is what "full costs" means. What matters is the definition of "costs"—a question that respondents and their *amici* all but ignore. The second sentence of Section 505 establishes that "costs" did not include attorneys' fees until 1909, and does not include expert witness fees (or other non-taxable expenditures) to this day. This Court's cases confirm this conclusion, as explained next.

II. PRECEDENT.

Respondents give remarkably short shrift to the three recent precedents in which this Court not only defined the statutory term "costs" as those items within Sections 1920 and 1821, but also held that expert witness fees (a large part of the award here) are *not* "costs." *See* Resp.Br.32-36. This Court could not affirm the decision below without doing serious damage to this trilogy of decisions.

1. The Court has squarely held that the term "costs" in Federal Rule of Civil Procedure 54(d) is limited to costs taxable under Sections 1920 and 1821. *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987). Recognizing that this holding would require reversal here if extended to the Copyright Act, respondents seek to confine *Crawford Fitting* to "cases implicating only generally-applicable

Rule 54(d) and not a specific statute." Resp.Br.33. The Court's holding, however, was not so limited.

The foundation for the holding of *Crawford Fitting* was the Fee Act, which "specif[ies] in detail the nature and amount of the taxable items of costs *in the federal courts*." 482 U.S. at 440 (emphasis added). Sections 1920 and 1821, the Court explained, "*control a federal court's power to hold a losing party responsible for the opponent's witness fees*." 482 U.S. at 444 (emphasis added). The Court held that Sections 1920 and 1821 control regardless of whether costs are sought "through Rule 54(d) *or any other provision*." *Id.* at 445 (emphasis added). The Court concluded: "We hold that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Ibid.*

Thus, while respondents are surely right that Congress can override the default rule of *Crawford Fitting*, any such statute must do so "explicit[ly]." 482 U.S. at 429. As the Court subsequently explained this principle: "In *Crawford Fitting* ... we held that [Sections 1920 and 1821] define the full extent of a federal court's power to shift litigation costs *absent express statutory authority to go further*." *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 86 (1991) (emphasis added).

Casey held that a prevailing party could not recover its expert witness fees under 42 U.S.C. § 1988's authorization for "attorneys' fees" or "costs." 499 U.S. at 87 & n.3. Respondents contend that "*Casey* did not involve how to interpret the word 'costs'" but instead "involved only how to interpret the term 'attorney's fees.'" Resp.Br.34. That is simply false. In dissent,

Justice Stevens had argued that "the expert fees requested here" were "part of the 'costs' allowed by § 1988 even if they are not part of the 'attorney's fee.'" 499 U.S. at 87 n.3. The Court expressly rejected this argument, being "aware of no authority to support" Justice Stevens' view that "the term 'costs' had a different and broader meaning" under § 1988. *Ibid.*

Casey reiterated the rule announced in *Crawford Fitting* that "the word 'costs'" in Rule 54(d) "is to be read in harmony with the word 'costs' in 28 U.S.C. § 1920," and held that "the *same is true of the word 'costs' in § 1988.*" 499 U.S. at 87 n.3 (emphasis added). This ruling demolishes respondents' suggestion (Resp.Br.33) that the *Crawford Fitting* rule is limited to Rule 54(d) and does not apply to federal statutes.

Most recently, *Murphy* made the clarion statement that "*no statute* will be construed as authorizing the taxation of witness fees *as costs* unless the statute 'refer[s] explicitly to witness fees.'" 548 U.S. at 301 (emphases added). (Contrary to respondents' suggestion, Resp.Br.35-36, neither this part of the Court's decision nor the portion of the government's brief cited by petitioners, Pet.Br.30-31, had anything to do with the Spending Clause.) That holding of *Murphy* is alone sufficient to resolve this case, since Section 505 contains no explicit reference to expert witness fees.

Respondents do not acknowledge this part of *Murphy*, arguing instead that *Murphy* held only that "the term 'attorneys' fees,' standing alone, is generally not understood as encompassing expert fees." Resp.Br.35. Once again, respondents misrepresent the Court's holding. The parents in *Murphy* had "contend[ed] that [the Court] should interpret the term 'costs' in accordance with its meaning in ordinary usage, and that § 1415(i)(3)(B) should therefore be read to authorize

reimbursement of all costs parents incur in IDEA proceedings, including expert costs." 548 U.S. at 297. The Court rejected this argument primarily because "'costs' is a term of art" that "does not include expert fees." *Ibid.* And "[t]he use of this term of art, rather than a term such as 'expenses,' strongly suggests that § 1415(i)(3)(B) was not meant to be an open-ended provision" providing recovery "for all expenses incurred by prevailing parents in connection with an IDEA case." *Ibid.*

2. The Court's trilogy of cases establishes that "costs"—as used in Rule 54(d), in Section 1988, and in the IDEA—is a term of art that means only taxable costs as enumerated in Section 1920 and limited by Section 1821. The same term, as used in the Copyright Act, should be given the same meaning. "Statutes *in pari materia* are to be interpreted together, as though they were one law." Scalia & Garner, *supra*, at 252.

Respondents' critique of the "trichotomy" of "costs," "fees," and "expenses," is nothing other than an assault on this Court's precedents. *See* Resp.Br.13. Although respondents contend that this tripartite taxonomy "has no grounding in the U.S. Code," the Court has endorsed this framework, either explicitly or implicitly, in the controlling trilogy. *Murphy*, 548 U.S. at 297; *Casey*, 499 U.S. at 87-88 & n.3; *Crawford Fitting*, 482 U.S. at 441-42. That is because these terms are used in this sense in "the texts of other statutes too numerous and varied to ignore." *Murphy*, 548 U.S. at 306-07 (Ginsburg, J., concurring); *see also* Pet.Br.24 n.1. For example, *Casey* and *Murphy* held that statutes authorizing *both* "costs" *and* "attorneys' fees" did *not* also authorize "expert witness fees." Yet, respondents' position in this Court is that the Copyright Act—

which authorizes costs and attorneys' fees—*sub silentio* authorizes expert witness fees.

That respondents are fighting the tide of precedent is also evident in their complaint that Section 505 does not cross-reference Section 1920. Resp.Br.17. Neither Rule 54(d)(1), nor 42 U.S.C. § 1988, nor the IDEA, mentions or cross-references Section 1920; yet, this Court held that the term "costs" in those provisions was to be interpreted by reference to Section 1920. *See* Pet.Br.28-32. Indeed, federal cost-shifting statutes almost never expressly incorporate Section 1920. *See id.* at 24 n.1 (identifying only one such statute, 28 U.S.C. § 2412). Nevertheless, this Court *consistently* interprets the term "costs" as a reference to the categories of expenditures listed in Section 1920, because it is a term of art in federal law. The whole point of a term of art is that Congress does not have to define it each time it is used—rather, it has the same meaning every time, unless Congress explicitly provides an alternative meaning.

Respondents also try to sow confusion by pointing out that Section 1920 and Section 505 define various "fees" as "costs," and argue that this "eviscerates petitioners' effort to treat costs, fees, and expenses as mutually exclusive categories." Resp.Br.25; *see also* BSA Br. 13. But of course, Congress is free to define *whatever it wants* as a "cost" (or a "fee" or an "expense"), and it has done so many times. Congress can treat what would otherwise be considered a "fee" (*e.g.*, attorneys' fees or expert witness fees) as a "cost" for purpose of a cost-shifting statute. That is precisely what the second sentence of Section 505 does by "add[ing] reasonable attorney's fees ... to the list of costs that prevailing [parties] are otherwise entitled to recover" under "28 U.S.C. §[§] 1920" and "1821." *Murphy*, 548

U.S. at 297. That is the kind of "explicit" congressional command required to override the tripartite taxonomy that otherwise controls federal cost-shifting statutes. But in the absence of such an express legislative statement, "costs" means taxable costs—period.

* * *

The Court's trilogy of key decisions makes clear that the terms of art "costs," "fees," and "expenses" have default meanings in the absence of explicit congressional direction to the contrary. The default meaning of "costs" is "taxable costs," and nothing in the Copyright Act authorizes courts to *also* award expert witness fees or other non-taxable expenditures as costs. A straightforward application of those precedents leads inexorably to reversal.

III. Historical Practice.

"Full costs" has *always* been understood as "taxable costs." In 1831, Congress would have looked to state law, and "full costs" meant only all the costs available under a state statutory schedule. This was consistent with English practice under "full costs" statutes, which trace their roots back to the Statute of Anne. And by the time Congress amended the Copyright Act in 1909 and 1976, it was well-entrenched as a matter of federal law that "costs" meant "taxable costs"—which is why attorneys' fees were expressly added to Section 505.

Respondents propose an alternative version of history, but neither they nor their *amici*—in 177 pages of briefing by some of the finest law firms in the nation—identifies even a single case in which *any* non-taxable litigation expenditures were awarded under any iteration of the Copyright Act until 2005, when the Ninth Circuit (erroneously) decided, *for the first time in the*

history of the Copyright Act, that "full costs" includes non-taxable expenses. *Twentieth Century Fox*, 429 F.3d at 884-85. Respondents' position is that non-taxable expenditures were authorized and even mandatory throughout this period, yet they cannot cite a single case to that effect. The dearth of contemporaneous authority shows that respondents' "history" was manufactured for this case.

1. *Federal law*. Respondents make the remarkable assertion that Congress "had no need to specify in the 1831 Copyright Act that 'full costs' included reasonable attorneys' fees; 'full costs' alone sufficed to make that clear at the time." Resp.Br.30. Yet they cannot, and do not, cite a single case approving such an award. That undeniable *fact* is more than sufficient to dispose of respondents' historical fiction.

Respondents further represent that Congress's express *addition* of authority to award attorneys' fees in the 1909 revisions was a mere "clarification" of power the courts already had (but apparently never used). But respondents cannot explain why Congress, if it were merely clarifying the availability of attorneys' fees under Section 505, made those fees *discretionary* when it added them, while leaving the "full costs" *mandatory* until 1976. Nor can respondents explain why, if expert witness fees were always available (and mandatory for more than a century), *no court ever awarded them in a copyright case*.

What the historical record actually shows is that "full costs" under Section 505 has never included non-taxable expenditures. Courts routinely equated the "full costs" of the 1870 and 1909 Acts with ordinary, taxable costs. *See Official Aviation Guide Co.* v. *Am. Aviation Assocs.*, 162 F.2d 541, 543 (7th Cir. 1947); *Basevi* v. *Edward O'Toole Co.*, 26 F. Supp. 41, 50

(S.D.N.Y. 1939); *Bullinger* v. *Mackey*, 4 F. Cas. 648, 649 (C.C.E.D.N.Y. 1877).

In 1909, when Congress reenacted the "full costs" language, it stated that "[t]he provision for full costs ... is necessary in view of" the then-existing $500 cost limitation (identical to the one that governed federal copyright from 1819 to 1831). H.R. Rep. No. 2222, 60th Cong., 2d Sess. 19 (1909); *see also* Pet.Br.40-41. Respondents highlight the sliver of daylight between petitioners and the United States regarding the meaning of this legislative history. Resp.Br.42. At the same time, however, respondents have *no* explanation for why Congress in 1909 thought that *its* reenactment of the "full costs" language was necessary. And while either petitioners' or the United States' view is consistent with reversal, respondents have *no* argument that any legislative history of any iteration of the Copyright Act supports affirmance.

2. *State law*. "Full costs" was routinely used in state law to mean only taxable costs, as contrasted against phrases such as "half costs," "double costs," etc. That this was the law in New York cannot be disputed. *See* Rev. Stat. N.Y., ch. X, tit. I, §§ 7.1, 7.3; tit. III, §§ 49, 50 (enacted 1830). Other states had nearly identical schemes. Pet.Br.5, 38-39; U.S.Br.17. And federal courts followed state law in awarding copyright costs prior to 1853. *See Ferrett* v. *Atwill*, 8 F. Cas. 1161, 1164 (C.C.S.D.N.Y. 1846). Respondents have no answer for this.

Contrary to respondents' contention, the existence of attorneys' fees in some state-law fee bills does not disprove that these statutes shifted "party-and-party" costs; such costs simply meant those provided for by statute. Resp.Br.39. The case law refuting respondents' position is extensive. *E.g.*, *Attorney-Gen.* v. *N.*

Am. Life Ins. Co., 91 N.Y. 57, 61 (1883) ("costs as between party and party ... are regulated by the Code; their amount fixed"); *Stevens & Cagger* v. *Adams*, 1840 WL 3450 (N.Y. Sup. Ct. 1840).

Respondents' contention that "full costs" was "[*n*]*ever*" used "in contrast with provisions that adjusted the amount of costs awardable" such as "double" or "half" costs (Resp.Br.41) is just false. *See* Rev. Stat. Mass. 1836, ch. 121, §§ 6-8; *Lakeman* v. *Morse*, 9 Mass. 126, 130 (1812); *Rensselaer & Saratoga R.R.* v. *Davis*, 55 N.Y. 145, 149 (1873); *Bartle* v. *Gilman*, 18 N.Y. 260, 262 (1858).

3. *English law.* English statutes providing for "full costs" allowed only limited, party-and-party costs. Pet.Br.36-38; U.S.Br.21-22; *see also Irwine* v. *Reddish*, 5 B. & Ald. 796 (K.B. 1822); *Jamieson* v. *Trevelyan*, 24 Law Tim. Rep. 222 (Exchequer 1855); *Avery* v. *Wood & Sons*, 65 Law Tim. Rep. 122 (Eng. 1891). Such costs long excluded expert fees. Pet.Br.36-37; *see May* v. *Selby*, 4 Man. & G. 142 (1842); *Severn* v. *Olive*, 3 Brod. & B. 71 (1821). This understanding reaches back to the earliest copyright law, the Statute of Anne, and there are numerous early statutes showing that, by itself, the phrase "full costs" did not shift more than party-and-party costs. *E.g.*, 5 & 6 Will. IV, ch. 76, § 133 (1835) (shifting "costs *as between attorney and client*" (emphasis added)); *id.* § 50 ("full costs *as between attorney and client*" (emphasis added)).

Respondents, however, posit that "full costs" always meant all litigation expenditures until Parliament repealed such provisions through the Limitations of Actions and Costs Act, 5 & 6 Vict., ch. 97 (1842) (the "Limitations Act"), replacing them all with a "party-and-party" system of cost-shifting. *See* Resp.Br.46-47 & n. 12. This argument fails.

First, respondents appear to have cribbed this argument, nearly *verbatim*, from the *losing party* in *Avery*. *See* 65 Law Tim. Rep. at 122-24. The *Avery* court rejected the very reading of "full costs" respondents propose here, as well as respondents' reading of the Limitations Act, which did not apply to "full costs" provisions. *Id.* at 124 (Fry, L.C.J.); *see also* John Gray, *A Treatise on the Law of Costs in Actions & Other Proceedings in the Courts of Common Law at Westminster* 183-84 (1853).

Second, respondents have no basis for concluding that either *Jamieson* or *Irwine* had anything to do with the Limitations Act—the former says nothing about it (24 Law Tim. Rep. at 222-23), and the latter pre-dates it—so respondents just criticize the outcomes of these cases. *See* Resp.Br.47. But this Court is not reviewing the correctness of those decisions; rather, they shed light on the historical origins and meaning of "full costs" provisions.

Third, respondents ignore that *Avery*, *Jamieson*, and *Irwine* were interpreting "full costs" language in statutes stretching back to the early 1700s. *See Jamieson*, 24 Law Tim. Rep. at 222-23. These cases simply acknowledged the long-held understanding of "full costs" in numerous statutes, including "*all the Copyright Acts from the time of Anne.*" *Avery*, Law Tim. Rep. at 124 (emphasis added). That is the context from which our own Copyright Act was born.

* * *

A continuous line of precedent and practice—from English law, through state law, to federal law—shows unmistakably that "full costs" always meant "taxable costs," just as this Court held in the trilogy of cases construing the noun "costs." The adjective "full" specifies the amount of such costs that may be recovered; but it does not change the nature of the costs themselves. Respondents' alternate explanation has no historical support.

IV. POLICY CONSIDERATIONS.

"The parties here can agree about one thing: The Court 'need not look to policy considerations at all.'" Resp.Br.48 (quoting Pet.Br.42). This agreement renders irrelevant nearly all of the *amicus* briefs filed in support of respondents. *See* Oman Br. 3-13; NMPA Br. 6-19; Baicker-McKee Br. 8-12; BSA Br. 3-10; Copyright Alliance Br. 6-22. None of the policy considerations respondents or their *amici* raise warrant departure from the text, structure, precedent, and history of Section 505.

1. Respondents and their *amici* argue that compensating rights-holders for non-taxable expenditures incurred in infringement litigation would further the Copyright Act's goals. *E.g.*, Resp.Br.56. Arguments such as these "are more properly directed at Congress." *Taniguchi*, 566 U.S. at 573. Congress, not the courts, decides whether, when, and how costs and fees should be shifted, and if cost- and fee-shifting should be a one-way or two-way street. *See* Pet.Br.49. That division of authority fosters the separation of powers (*id.* at 43), which respondents and their *amici* fail to address.

Moreover, in weighing such policy considerations in the context of attorneys' fees, the Court has taken an explicitly "party-neutral" approach to recoveries under the Copyright Act. *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 525 n.12 (1994). Rather than always rewarding the rights-holder (or the accused infringer), the Court has recognized that copyright litigation affects incentives throughout the spectrum of innovation. *See Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016). The purposes of the Copyright Act (and the constitutional provision the statute implements) are best served by fostering productive litigation and discouraging abusive litigation, not by reflexively favoring the rights-holder.

Unlike fees, costs generally do not turn on the relative merits of the parties' positions. Attorneys' fees are "*award*[*ed*]" by the district court after a discretionary judicial balancing process, including a detailed assessment of the amount of fees and the attorneys' charged rates. 17 U.S.C. § 505 (emphasis added); *see also* Fed. R. Civ. P. 54(d)(2). Costs, on the other hand, are "tax[ed]" by the clerk (28 U.S.C. § 1920), which is "merely a clerical matter." *Taniguchi*, 566 U.S. at 573; *see* U.S.Br.8-9. Respondents' position would necessitate creation and oversight of an entire discretionary jurisprudence for carrying out cost *taxation*—a function that could not be delegated to the clerk, as applying such balancing is itself an exercise of judicial power.

Moreover, respondents offer no limiting principle as to what might constitute "costs" under their approach. Would it include the lost wages of witnesses? What about the salaries of executives and in-house counsel responsible for overseeing the litigation? Or lost sales, revenues, or business opportunities? The

virtue of the categories in Section 1920 is that they are definite and well-understood. Respondents' approach is neither; it would, in fact, be an invitation to chaos.

2. Respondents separately suggest that this Court should read Section 505 expansively because Rimini and Mr. Ravin are, in respondents' view, bad actors. Resp.Br.8-11, 53. This argument is legally irrelevant—if "full costs" under the Copyright Act is governed by Section 1920, then those limits must be enforced regardless of the litigation conduct of either party. Moreover, as a factual matter, respondents grossly mischaracterize the record.

Respondents discuss Mr. Ravin's previous employer, TomorrowNow (Resp.Br.8), but fail to inform the Court that the jury was instructed that it could "not use evidence concerning TomorrowNow to infer that ... [Ravin], Rimini Street, or any individual employed by Rimini Street did, or was more likely to have done, the things that Oracle contends." Jury Inst. 20, No. 2:10-cv-106, Dkt. 880 at 21. Nor do respondents inform the Court that Mr. Ravin *is the prevailing party*, having defeated every claim leveled against him. JA257-71, JA337-38.

Respondents also cite snippets of trial testimony to construct a story of intentional infringement. Resp.Br.9-10. But the jury rejected that narrative—ruling for petitioners on every claim alleging intentional wrongdoing (JA257-71), and expressly finding that Rimini's conduct was "innocent"—*i.e.*, that Rimini "was not aware" and "had no reason to believe" that its conduct infringed (JA255-56). The court of appeals similarly explained that Rimini is engaged in "lawful competition" with respondents. JA315.

Respondents did not challenge any of those rulings in this Court, and it is improper for them to advance here a theory of the case that was rejected below.

3. The only pertinent policy consideration here is protecting the efficiency and economy of federal litigation.

The approach proposed by respondents and their *amici* would result in *more* litigation, and the development of a new body of federal common law, as parties dispute in every case under every statute whether a particular expenditure is awardable as a "cost" of litigation. More than 200 federal statutes shift "costs" in some form—including "costs," "full costs," "all costs," "costs of the action," "costs of suit," "costs of the proceeding," etc. Under respondents' view that "costs" means all expenses of litigation (text, precedent, and history be damned), there would be endless disputes about cost awards under those statutes.

The approach advocated by petitioners (and the United States), in contrast, would result in *less* litigation because all such disputes would be resolved by the default categories of costs, fees, and expenses, unless Congress makes explicit some departure from that framework. The Court has already opted for precisely that approach. *Murphy*, 548 U.S. at 297. Indeed, this Court recently reminded litigants and lower courts that "[i]t has been the Court's approach to interpret" cost- and fee-shifting statutes "in a consistent manner." *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1646 (2016). Respondents and their *amici* ignore this point in arguing that the Copyright Act is unique or that the meaning of "costs" should be relitigated, on a statute-by-statute basis, *ad infinitum*.

* * *

While policy considerations are unnecessary to decide this case, the die has already been cast. When faced with whether to limit expert fees in this Court's original cases to the confines of Sections 1920 and 1821 *even though* those statutes may not by their terms apply to such cases, the Court held (unanimously) that "the best approach is to have a uniform rule that applies in all federal cases." *Kansas* v. *Colorado*, 556 U.S. 98, 103 (2009). Applying the same approach to the Copyright Act requires reversal of the Ninth Circuit's decision allowing respondents to recover expert witness fees and other non-taxable expenditures under 17 U.S.C. § 505.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

BLAINE H. EVANSON
JOSEPH A. GORMAN
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071
(213) 229-7000

MARK A. PERRY
Counsel of Record
JEREMY M. CHRISTIANSEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
MPerry@gibsondunn.com

Counsel for Petitioners

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